

STONE ■ MAGNANINI
LLP

C O M P L E X C O M M E R C I A L L I T I G A T I O N

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January 20, 2012

VIA CM/ECF

Honorable Michael A. Shipp, U.S.M.J.
United States District Court for the District of New Jersey
Martin Luther King, Jr. Federal Building
50 Walnut Street
Newark, New Jersey 07101

Re: *Walsh Securities, Inc. v. Cristo Property Management, LTD, et al.*
Civil Action No. 97-3496 (DRD/MAS)

Dear Judge Shipp:

This firm represents plaintiff Walsh Securities Inc. (“WSI”) in the above-referenced action. WSI submits this brief letter in response to the woefully inadequate affidavit of Vincent Sharkey submitted by defendants Commonwealth, Nations and Fidelity (“Defendants”). WSI relies on its prior submissions [Dkt. 469 & 471] because once again Defendants fail to provide any facts that remotely suggest the information sought is protected by the work product doctrine. Accordingly, the Court should overrule Defendants’ objections concerning the amount of their loss reserves and allow WSI to continue the deposition of the Defendants’ Rule 30(b)(6) witness.

As the Court noted in its January 3, 2012 Letter Order, the burden of showing that certain information is protected rests with Defendants. *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 138 (3d Cir. 2000). Defendants did not overcome that burden in their initial submissions or during oral argument. Thus, the Court graciously gave Defendants another opportunity to provide “more specific information” from which the Court could render its decision. In response, the Defendants filed a seven paragraph affidavit that is so barren and bereft of meaningful information that it flies in the face of this Court’s Order. The affidavit simply regurgitates the few facts already provided to the Court in the letters submitted on October 5th and October 11th and during oral argument on December 7, 2011. [Dkt. 469-472].¹

Without explaining *who* set the reserves, *when* the reserves were set or changed, or *why* the reserves were changed, the Court is left to guess whether the information qualifies as work product. While Defendants believe that anonymous claims representatives adjusting reserves at various undisclosed times is sufficient, the Third Circuit held in *Holmes* that the Court’s determination, even if reasonable, cannot be “based on nothing more than *assumptions*.” *Id.* (emphasis added). *Holmes* is especially apt here. There, the defendants “claimed nothing more

¹ For example, compare paragraphs 2-6 of the Sharkey affidavit with the testimony of Donna Sullivan provided in Dkt. 469, at 2-8. The Sharkey affidavit does not provide any more information than Ms. Sullivan’s testimony.

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than that the memorandum was written in connection with the claim by Plaintiff" and was therefore not work product. *Id.* at 139. If that phrase sounds familiar it is because that is in essence the same claim made by Defendants. The entirety of the affidavit boils down to this simple statement: "[t]he loss reserves in this matter were set by Claims Administrators at some point...." (Sharkey Aff'd at ¶3). The Third Circuit wholeheartedly rejected the notion that such statements could establish the privilege – "[t]he mere fact that the memorandum was prepared 'in connection with' [Plaintiff's] administrative claim . . . hardly establishes that it was prepared in anticipation of litigation." *Id.* Additionally, Defendants' statements are suspect because as indicated during oral argument not all of Defendants' claims administrators are lawyers. (See, e.g., Exhibit A attached hereto). Clearly, Your Honor's request for "particularized" information was ignored by Defendants.

The other case cited in the Court's Order also supports the conclusion that Defendants' claim should be rejected. In *Amerada Hess*, the Third Circuit held that the mere fact a report was prepared by outside counsel was not dispositive. "[A]pplication of the [attorney work product doctrine] depends upon the nature of the document, the extent to which it may directly or indirectly reveal the attorney's mental processes, the likely reliability of its reflection of witness' statements, the degree of danger that it will convert the attorney from advocate to witness, and the degree of availability of the information from other sources." *United States v. Amerada Hess Corp.*, 619 F.2d 980, 987 (3d Cir. 1980). In the instant case, the information sought is simply a number and a date – no communications and no mental impressions. The *Amerada Hess* court held that this type of information, which "does not directly or indirectly reveal the mental processes of the [attorney] . . . [and] furnishes no information as to the content of any statement," is not subject to work product protection. *Id.* at 987-988. Had Defendants read these two cases cited in the Court's Order they would have understood that the same reasoning applies with equal force here.

At the very least, Defendants should have identified the anonymous claims administrators and the exact dates that the reserves were set and changed. Given Defendants' paltry, spare submission, this exercise is nothing but a guessing game. Moreover, if any of this information is truly protected, which it clearly cannot be, then Defendants could have submitted documentary proof *in camera*. They did not do so despite all the opportunities given by the Court. They are stalling this case by seeking cover under a work product protection that is unavailable to them because the loss reserves were set in the *ordinary course of their business* and not in anticipation of litigation. *Holmes*, 213 F.3d at 138.

For these reasons and those previously stated on the record, the Court should order that the amount of Defendants' claim reserves and the date the reserves were set and changed is discoverable and not subject to Defendants' claims of work product protection.

Respectfully submitted,

/s/ Robert A. Magnanini
Robert A. Magnanini

Enclosures

EXHIBIT A



Sandra (Sandi) Miller
Title Insurance at Fidelity National Financial
Greater Chicago Area | Real Estate

Join LinkedIn and access Sandra (Sandi) Miller's full profile.

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- Contact **Sandra (Sandi) Miller** directly



Sandra (Sandi) Miller's Overview

Past	<ul style="list-style-type: none">• Claims Administrator at Fidelity National Title Group• Title Insurance at Fidelity National Title• Title Insurance at Chicago Title Insurance Company
Education	<ul style="list-style-type: none">• Benedictine University• Elmhurst College
Connections	21 connections

Sandra (Sandi) Miller's Experience

Claims Administrator

Fidelity National Title Group

2008 – 2009 (1 year)

Title Insurance

Fidelity National Title

1976 – 2007 (31 years)

Title Insurance

Chicago Title Insurance Company

Public Company; 5001-10,000 employees; FNF; Real Estate industry

1976 – 2007 (31 years)

Sandra (Sandi) Miller's Education

Benedictine University

MBA, Marketing

Angela Hoffenkamp

Paralegal - Real Estate Industry

Greater Chicago Area | Law Practice

Past

- Title Insurance - Real Estate Professional at Fidelity National Financial
- Paralegal - Claims Administrator - Assistant VP at Fidelity National Financial

Connections

52 connections

Angela Hoffenkamp's Experience

Title Insurance - Real Estate Professional

Fidelity National Financial

Public Company; 5001-10,000 employees; FNF; Insurance industry

July 1984 – March 2009 (24 years 9 months)

Paralegal - Claims Administrator - Assistant VP

Fidelity National Financial

Public Company; 5001-10,000 employees; FNF; Insurance industry

July 1984 – March 2009 (24 years 9 months)

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- job inquiries
- business deals
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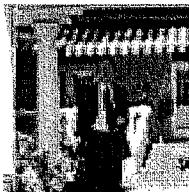
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Philip Meluch
 Claims Administrator at Fidelity National Title
 Greater Omaha Area | Banking

Current	<ul style="list-style-type: none"> Claims Administrator at Fidelity National Title
Past	<ul style="list-style-type: none"> Senior Title Examiner at LendingTree Commercial Loan Administrator at Bank of America Commercial Documentation Review Analyst at First Union National Bank
Education	<ul style="list-style-type: none"> Philadelphia Institute for Paralegal Training Duke University Michigan State University
Recommendations	6 people have recommended Philip
Connections	39 connections

Philip Meluch's Summary

Professional level documentation and compliance analyst with 12 years of industry experience. Having ac Estate, Construction Lending, Commercial Default, Tax, and Estates & Trusts administration. Have a dem work in a production environment without loss of client service or increase in institutional risk.

Specialties

Commercial Loan Documentation, Participations, Real Estate, Construction Lending. Complex interest rat Commercial and Residential Title

Philip Meluch's Experience

Claims Administrator

Fidelity National Title

Public Company; 5001-10,000 employees; fnf; Real Estate industry
 March 2009 – Present (2 years 10 months)

Supporting a pipeline of approx. 150 Claims ranging from deed reformation and prior tax liens to dimunitic

Senior Title Examiner

LendingTree

2005 – 2008 (3 years)

Commercial Loan Administrator

Bank of America

Public Company; 10,001+ employees; BAC; Banking industry
 July 2001 – November 2002 (1 year 5 months)

Processed Real Estate Commercial Loan Documentation.

Coordinated the work of outside vendors.

Booked loans on the CLAS system

Commercial Documentation Review Analyst

First Union National Bank

Public Company; 10,001+ employees; WB; Banking industry
July 1993 ~ July 1998 (5 years 1 month)

- Responsible for revision and distribution of Commercial Loan Procedure Manual for 325 employees acrc
- Reviewed participation, and construction loans.
- Processed and audited complex commercial loan documentation for Virginia, Maryland, DC, Tennessee

Philip Meluch's Education

Philadelphia Institute for Paralegal Training

Certificate, Fiduciary Management
1990 – 1990

Duke University

Certificate of Advanced Graduate Study, Political Science
1984 – 1988

Michigan State University

B.A., International Relations
1980 – 1984

Activities and Societies: Graduate: James Madison College

Philip Meluch's Additional Information

Groups and Associations:



American Land Title Association - ALTA



Bank of America Employees & Alumni Network



Craigslist Group



Economy



Florida Title Companies and Agents



James Madison College at Michigan State University



Lending Tree



LendingTree Alumni



Paralegal Network



Title Insurance Law

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Title Insurance and Settlement Service Network



Wachovia, Financial Services & Banking Alumni



White House

Honors and Awards: Lending Tree Employee of the Month September 2005
Compuserve/AOL employee of the Month May 2001

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